U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ASHLEY A. YUSUF and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 99-826; Submitted on the Record;
Issued August 21, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for merit review of its July 30, 1997 decision, constituted an abuse of discretion; (2) whether appellant has established that he sustained a recurrence of disability in December 1996 causally related to his May 13, 1995 employment injury; and (3) whether the Office properly denied appellant's request for reconsideration of its February 6, 1997 decision on the grounds that it was untimely filed and failed to present clear evidence of error.

The Board finds that the refusal of the Office to reopen appellant's case for merit review of its July 30, 1997 decision did not constitute an abuse of discretion.

On September 25, 1995 appellant, then a 39-year-old letter sorting machine clerk, filed a claim alleging that he sustained an injury on September 19, 1995 in the performance of duty. By decision dated January 11, 1996, the Office denied appellant's claim on the grounds that he did not establish fact of injury; however, in a decision dated July 24, 1996, the Office vacated its January 11, 1996 decision and accepted appellant's claim for a temporary aggravation of chronic back pain. The Office assigned the case file number A02-0704678.

By decision dated October 1, 1996, the Office denied appellant's claim for a recurrence of disability beginning March 15, 1996 causally related to his September 19, 1995[1] employment injury.[2] In a decision dated July 30, 1997, a hearing representative affirmed the Office's October 1, 1996 decision after finding that appellant had not established that his disability

[1] The Office found that appellant had not established a recurrence of disability due to his September 19, 1996 employment injury; however, this appears to be a typographical error.

[2] The notice of recurrence of disability (Form CA-2a) does not appear to be in the record.

beginning March 15, 1996 and his April 23, 1996 back surgery were causally related to his September 19, 1995 employment injury.[3]

In a letter dated June 1, 1998, appellant requested reconsideration. By decision dated September 1, 1998, the Office denied merit review of its July 30, 1997 decision.

The only decision in file number A02-0704678 over which the Board has jurisdiction is the Office's September 1, 1998 decision denying appellant's request for a review of the merits of the case. Because more than one year has elapsed between the issuance of the Office's decision dated July 30, 1997 and December 7, 1998, the date appellant filed his appeal before the Board, the Board lacks jurisdiction to review the decision dated July 30, 1997.[4]

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issue(s) within the decision, which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law, or

"(ii) Advancing a point of law or fact not previously considered by the Office, or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[5]

Section 10.138(b)(2) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[6] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[7] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[8]

In support of his request for reconsideration, appellant submitted a medical report dated February 28, 1997 from Dr. Todd Soifer, an orthopedic surgeon, who listed the dates that he treated appellant for a May 13, 1995 employment injury. Dr. Soifer's medical report is not

[3] The hearing representative instructed the Office to combine the case records for appellant's September 19, 1995 and May 13, 1995 employment injuries.

[4] *See* 20 C.F.R. §§ 501.2(c), 501.3(d).

[5] 20 C.F.R. § 10.138(b)(1).

[6] *See* 20 C.F.R. § 10.138(b)(2).

[7] *Daniel Deparini*, 44 ECAB 657 (1993).

[8] *Id.*

relevant to the issue in the instant case, which is whether appellant sustained a recurrence of disability beginning March 1996 due to an injury on September 19, 1995.

Appellant further submitted a report dated April 16, 1998 from Dr. Malik Akhtar, an orthopedic surgeon. Dr. Akhtar noted that he had treated appellant since August 1997 and described a work-related injury on May 13, 1995. Dr. Akhtar did not address the pertinent issue of whether appellant sustained disability from work beginning March 1996 due to his accepted September 19, 1995 employment injury. Thus, Dr. Akhtar's report does not constitute relevant evidence sufficient to warrant a reopening of appellant's claim.

An abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probably deductions from known facts.[9] Appellant has made no such showing here and thus the Board finds that the Office properly denied his application for reconsideration of his claim.

The Board further finds that appellant has not established that he sustained a recurrence of disability in December 1996 causally related to his May 13, 1995 employment injury.

On May 26, 1995 appellant filed a claim for a traumatic injury occurring on May 13, 1995 in the performance of duty. The Office accepted the claim, assigned file number A02-0698154, for a sprain of the cervical and lumbar spine and impingement of both shoulders.

Appellant filed notices of recurrence of disability alleging that on August 14 and 25,[10] 1995 he sustained a recurrence of disability causally related to his May 14, 1995 employment injury. By decision dated June 17, 1996, the Office denied appellant's claim for recurrences of disability in August 1995 due to his accepted May 13, 1995 employment injury. In a decision dated February 6, 1997, a hearing representative affirmed the Office's June 17, 1996 decision.

On January 13, 1997 appellant filed a notice of recurrence of disability alleging that on December 28, 1996 he sustained a recurrence of disability causally related to his May 13, 1995 employment injury. By decision dated February 5, 1998, the Office denied appellant's claim for a December 1996 recurrence of disability. In a letter dated June 1, 1998, appellant requested reconsideration of his case assigned file number A2-698154.[11]

By decision dated September 1, 1998, the Office noted that appellant had not specified whether he wished to review the February 6, 1997 or February 5, 1998 decision. The Office denied appellant's request for reconsideration of the February 6, 1997 decision on the grounds that the request was not timely filed and did not present clear evidence of error.[12]

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[9] *Rebel L. Cantrell*, 44 ECAB 660 (1993).

[10] Appellant indicated that he stopped work following the alleged August 25, 1995 recurrence of disability on August 27, 1995.

[11] In an internal memorandum dated November 24, 1997, the Office combined File Number A2-704678 into File Number A2-0698154.

[12] The Office noted that appellant had not established clear evidence of error regarding either decision. However,

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[13]

In the present case, appellant sustained a sprain of the cervical and lumbar spine and impingement of both shoulders due to a traumatic injury on May 13, 1995. He subsequently returned to limited-duty employment. There is no evidence in the record establishing any change in the nature and extent of appellant's position as a cause of his claimed disability beginning December 1996.

In support of his claim, appellant submitted a report dated January 3, 1997 from Dr. Soifer, who related that appellant was "under my care for low back [and] neck injury. He has been out of work from December 28, 1996 through January 6, 1997." Dr. Soifer further noted that appellant could work only light duty. Dr. Soifer, however, did not attribute appellant's disability from work to his May 13, 1995 employment injury or provide any rationale for his findings and thus his opinion is insufficient to meet appellant's burden of proof.[14]

An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is causal relationship between his claimed condition and his employment.[15] To establish causal relationship, appellant must submit a physician's report in which the physician reviews the employment factors identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination of appellant and his medical history, state whether the employment injury caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his or her opinion. Appellant failed to submit such evidence in this case and, therefore, has failed to discharge his burden of proof.

The Board further finds that the Office properly denied appellant's request for reconsideration of its February 6, 1997 decision on the grounds that it was untimely filed and failed to present clear evidence of error.

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a request for reconsideration by appellant of the February 5, 1998 decision would be timely as made within one year of the decision. Any error by the Office, however, is harmless as appellant did not specifically request reconsideration of the Office's February 5, 1998 decision.

[13] *Terry R. Hedman*, 38 ECAB 222 (1986).

[14] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996) (medical conclusions unsupported by rationale are of diminished probative value).

[15] *Donald W. Long*, 41 ECAB 142 (1989).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[16] the Office's regulations provide that a claimant must: show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[17] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[18] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[19] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[20]

In its September 1, 1998 decision, the Office properly determined that appellant failed to file a timely application for review of its February 6, 1997 decision denying his claim for recurrences of disability on August 14 and 25, 1995 causally related to his May 14, 1995 employment injury. The Office rendered its last merit decision on this issue on February 6, 1997 and appellant requested reconsideration by letter dated June 1, 1998, which was more than one year after February 6, 1997.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[21] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[22]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[23] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[24] Evidence, which does not

[16] 5 U.S.C. §§ 8101-8193.

[17] 20 C.F.R. § 10.138(b)(1), (2).

[18] 20 C.F.R. § 10.138(b)(2).

[19] *Joseph W. Baxter*, 36 ECAB 228 (1984).

[20] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[21] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[22] *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

[23] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[24] *See Leona N. Travis*, 43 ECAB 227 (1991).

raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[25] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[26] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[27] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[28] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[29]

In support of his request for reconsideration, appellant submitted an office visit note from Dr. Soifer dated February 28, 1997. Dr. Soifer indicated that he was treating appellant for a May 13, 1995 employment injury and listed the dates he saw appellant "for a reoccurrence of the same injury." Dr. Soifer, however, did not render a diagnosis, list findings on examination, or provide a medical opinion supported by rationale regarding whether appellant had any disability from his limited-duty employment causally related to his May 13, 1995 employment injury. Thus, his opinion does not show that the Office committed any error in its prior decision.

Appellant further submitted duty status reports dated April 13, 1998 from Dr. Soifer, who listed work restrictions and checked "yes" that the history of injury corresponded to that shown on the supervisor's portion of the form. However, the Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question that opinion has little probative value and is insufficient to establish a claim.[30] Further, Dr. Soifer did not address the relevant issue of whether appellant was disabled from his limited-duty employment in August 1995 due to his accepted employment injury. Consequently, Dr. Soifer's duty status reports were insufficient to establish clear evidence of error.

In a medical report dated April 16, 1998, Dr. Akhtar discussed appellant's history of a May 1995 employment injury, discussed his May 1997 lumbar laminectomy and listed findings of painful and restricted movement of the cervical and lumbar spine. Dr. Akhtar noted that appellant was attempting to work in a limited-duty capacity and recommended psychiatric treatment and evaluation at a pain clinic. Dr. Akhtar, however, did not address the relevant issue of whether appellant sustained an employment-related recurrence of disability and thus his

[25] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[26] *See Leona N. Travis, supra* note 24.

[27] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[28] *See Leon D. Faidley, Jr., supra* note 20.

[29] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

[30] *Lee R. Haywood*, 48 ECAB 145 (1996).

opinion does not constitute evidence sufficient to show error on behalf of the Office in its prior decision.

In a note from the employing establishment's clinic dated June 2, 1998, a physician indicated that appellant could work restricted duty. As this evidence is not relevant to the issue of whether appellant sustained a recurrence of disability in August 1995, it is insufficient to raise a substantial question as to the correctness of the Office's last merit decision.

The record further contains a limited-duty job offer from the employing establishment, which appellant accepted on May 22, 1998. The issue in the present case, however, is medical in nature and can only be resolved by the submission of medical evidence.[31] As appellant did not submit evidence sufficient to *prima facie* shift the weight of the evidence in his favor and raise a fundamental question as to the correctness of the Office's February 6, 1997 decision, he has not met his burden of proof.

[31] *Ronald M. Cokes*, 46 ECAB 967 (1995).

The decisions of the Office of Workers' Compensation Programs dated September 1 and February 5, 1998 are hereby affirmed.

Dated, Washington, D.C.
August 21, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member